No. 16050

United States Court of Appeals

For the Ninth Circuit

McNEIL CONSTRUCTION COMPANY,
a corporation,

Appellant,

v.

THE LIVINGSTON STATE BANK,
a corporation,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Montana.

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I.
JURISDICTION

This is an appeal from a final order of District Judge W. D. Murray dismissing the amended complaint in this action before joinder of issue and on defendant's motion on the ground that plaintiff is not the real party in interest (R. 89-91). For convenience Appellant will be referred to either as "plaintiff" or "McNeil" and Appellee as "defendant". Jurisdiction is based on diversity of citi-

zenship (28 U.S.C.A. 1332), the plaintiff being a California corporation (R. 10, 20) and the defendant being a Montana banking corporation (R. 11, 20). The amount in controversy exclusive of interest and costs exceeds $3,000.00 (R. 5, 21). This Court has appellate jurisdiction under 28 U.S.C.A. 1291.

II.

THE QUESTIONS PRESENTED

There are two decisions of the District Court involved on this appeal. One, dismissing the original complaint with leave to plead over (R. 74-84). The second was a final order dismissing the amended complaint (R. 89-91). This action is one brought by plaintiff as a depositor of the defendant to recover the amount paid by defendant from plaintiff's account on 29 forged payroll checks. Plaintiff had a contract of insurance with Seaboard Surety Co. covering the loss. Seaboard, however, instead of paying the loss and being subrogated, loaned the money to plaintiff, which in turn executed a loan receipt agreement, a copy of which is set forth on pages 37 to 39 of the Record. Thereafter, plaintiff filed this suit.

The District Court held in dismissing the first complaint that it would not recognize loan receipt agreements as such; that, on the contrary, the loan was in fact payment; it reserved decision on the question of whether McNeil could maintain the action as trustee of an express trust and held that no equities were pleaded sufficient to show Seaboard should recover, although ex-

istence of such equities appeared in affidavits; and that plaintiff should plead over showing its equitable right to relief. The Court in its second decision dismissing the amended complaint held that McNeil could not maintain this action as trustee of an express trust under Rule 17 (R. 90).

These two rulings of the Court present the primary problems before this Court on this appeal. The basic mistake made by the District Court, and which probably had a decisive influence on its decision, was in assuming that through the device of a "loan receipt" the plaintiff and its surety could avoid equitable defenses which would be available against the Surety but not the insured. Such is not our contention, and it is unnecessary to determine this question in disposing of this appeal. Admitting for the sake of argument that these defenses are available, we claim the loan receipt enables plaintiff to maintain this suit and that the undisputed facts show that defendant's gross carelessness entitles plaintiff to summary judgment. *American Surety Co. v. Bank of California,* 133 Fed. (2d) 160 (C. A. 9th, 1943).

III.

STATEMENT OF THE CASE

A. *THE ORIGINAL COMPLAINT*

The complaint originally filed in this action alleged:

> 1. Plaintiff, a California corporation, deposited with defendant, a Montana banking corporation, a sum in excess of $5,000.00 in a checking account for the purpose, among other things, of drawing on said amount for wages to be paid to employees of the plain-

tiff. Between September 13, 1956 and September 28, 1956, the plaintiff employed one Lex Lamb as a nightwatchman and that unknown to the plaintiff, Lamb stole 400 blank payroll checks numbered 8401 to 8800, inclusive, from offices maintained by the plaintiff in Yellowstone National Park where the plaintiff was doing construction work (R. 4).

2. On September 26, 1956 Lamb forged the plaintiff's name to 29 of the checks stolen, each in the sum of $143.04; Lamb then cashed the checks which were paid by the defendant from funds on deposit with the defendant by the plaintiff in the total sum of $4,148.16. The Livingston State Bank was advised of the theft of the 400 payroll checks and the forgery of 29 thereof on or about October 26, 1956, which was within thirty days after the discovery by the plaintiff of the theft of the checks, and that the defendant refuses to refund to the plaintiff the said sum of $4,148.16, which is due and owing to the plaintiff from the defendant. Damages in that amount are demanded together with interest at the rate of six per cent (6%) from November 1, 1956 (R. 5).

B. *DEFENDANT'S MOTION*

The defendant appeared generally by motion to: (a) dismiss the action pursuant to Section 1406 of Title 28 of the United States Code on the ground that the action is filed in the wrong division (R. 6); (b) dismiss the action because the complaint did not state a claim against the defendant upon which relief could be granted (R. 6); (c) transfer the action from the Billings Division where it was originally filed to the Helena Division pursuant to Section 1406 of Title 28 of the United States Code (R. 6); and (d) require the joinder of Seaboard Surety Company as a party plaintiff on the ground that Seaboard Surety Company was the real party in interest (R. 7).

This last phase of the motion to require the joinder of Seaboard Surety Company was based upon an affidavit submitted with the motion stating on information and belief that the plaintiff had a contract of insurance with Seaboard Surety Company and that Seaboard had paid the loss and was subrogated to the rights of the plaintiff (R. 8-9).

The plaintiff filed an affidavit in opposition to the latter portion of the motion (R. 33). This affidavit admitted that Seaboard Surety Company issued an indemnity bond on behalf of the plaintiff but alleged that no payment had been made by Seaboard under this bond, but that on the contrary Seaboard Surety Company had loaned $4,148.16 to McNeil Construction Company pursuant to a loan receipt agreement, a copy of which is set forth on pages 37 to 39 of the Transcript.

C. *PLAINTIFF'S REQUEST FOR ADMISSIONS*

Immediately after defendant's appearance, plaintiff served and filed a Request for Admissions asking the defendant to (1) admit formal allegations; (2) admit that the checks were forged; (3) admit that they were paid by defendant; (4) admit that Lex Lamb, an employee of McNeil, was the forger; and (5) admit the genuineness of letters from the defendant to the plaintiff (R. 10-19).

D. *THE DEFENDANT'S RESPONSE TO THE REQUEST FOR ADMISSIONS*

The defendant admitted some, but not all, of the requests filed by the plaintiff (R. 20). It claimed that it was unable to truthfully admit or deny that the 29 pay-

roll checks were forged and that it was impossible for the defendant to secure the necessary information by reasonable inquiry (R. 21). This denial was made despite the fact that each of the 29 payroll checks cashed by the defendant were payable to the same individual; each for the same amount; each for the same payroll period (R. 16, 17, 21, 30-33); each was dated either September 25 or September 26 (R. 16). The defendant also stated that it was unable to either truthfully admit or deny that Lex Lamb admitted to agents of the Federal Bureau of Investigation that he had stolen the 400 payroll checks and forged plaintiff's name to 29 of them (R. 22). The defendant likewise claims that it was impossible for them to secure the necessary information from the FBI by reasonable inquiry (R. 23).

E. *THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT*

Before defendant's various motions referred to in subdivision B above were argued, the plaintiff filed a Motion for Summary Judgment based upon the affidavits of Lexington Lamb, R. H. Westland and Weymouth D. Symmes. Lamb's affidavit (R.24), obtained by plaintiff because of defendant's frivolous refusal to admit that Lamb forged these checks, asserted that he was employed by the McNeil Construction Company in September, 1956, for two or three weeks as a nightwatchman, ambulance driver, and switchboard operator, and that he left this job voluntarily at the end of one of his shifts by merely leaving at the end of the job, and that prior to

leaving McNeil and while he was still on McNeil's payroll, he took a number of blank payroll checks from McNeil, made out 29 or 30 of them payable to Lex Lamb, each for $143.04, forged McNeil's name to the checks, and cashed them at various places (R. 24-26).

Westland's affidavit (R. 27) asserted that he was project manager of the McNeil Construction Company for certain work being conducted in Yellowstone National Park in September, 1956. That during this period of time the company maintained offices at or near Canyon Village in the Park. He also asserted that "In the construction business there is a rapid turnover of workmen by reason of the fact that most workers employed by construction companies are transients." That Yellowstone National Park has no permanent residents or inhabitants capable of being hired to do the necessary manual labor, and that as a consequence when workmen are employed it is virtually impossible to check upon their back records. That Lamb was employed from September 13, 1956 to September 27, 1956, that he had a Social Security Card. That McNeil Construction Company's checks were kept in a four-drawer file cabinet in the timekeeper's office, that during the daytime when construction work was going on this office was always occupied by trusted employees, and that every evening and night the only access to this office was through a locked door or window or a small pass window; that on October 26, 1956, he received a phone call from Mr. Coghland, an employee of the defendant, advising the affiant that

he had two payroll checks which he "thought" were forged. Upon receiving this phone call an immediate examination of blank checks was made and one package was missing which included checks numbered 8401 to 8800, and that this was the first notice they had that their printed payroll checks had been stolen (R. 27-29).

Symmes, in his affidavit (R. 30), asserted that he had 28 of the 29 forged payroll checks in his possession. Each check was for $143.04; that from an examination of the checks the first check received by The Livingston State Bank was number 8650 and it was dated September 25, 1956; it recited that the payee's badge number was 77631, that it was for the pay period ending "9-26-56" payable to the order of "Lex Lamb." It was received by the bank on or before October 1, 1956, and was stamped paid on "10-1-56". That on October 2, 1956, the bank received three identical checks, each payable to Lex Lamb, each in the sum of $143.04, each dated September 25, 1956, except one which was dated September 26, 1956, and each recited on their face that they were for the pay period "9-26-56", each was endorsed by "Lex Lamb", each was stamped "paid 10-2-56". On October 3, 1956, eight of these checks cleared through The Livingston State Bank, each was marked paid on the same date, each was dated September 26, 1956, each was payable to the order of Lex Lamb, and each was for the payroll period ending "9-26-56". On October 4, 1956, six checks were stamped paid by The Livingston State Bank on "10-4-56", each was payable to the order of Lex Lamb in the sum of

$143.04, each was for the pay period ending "9-25-56". On October 5, 1956, three checks identical to the checks heretofore described were stamped paid by The Livingston State Bank, each was for the same amount, each was for the same payroll period. On October 6, 1956, three more checks were stamped paid by The Livingston State Bank, each identical to the foregoing checks, each payable to Lex Lamb, each for the identical amount, and each for the same payroll period. On October 6, 1956, three more of the checks cleared the bank and were stamped paid on that date. On October 9, 1956, four checks identical to the foregoing were stamped paid by the bank and that the 29th check was not in deponent's possession (R. 30-33). All of these checks are before this Court in their original form.

F. *THE AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT*

The defendant submitted one affidavit in opposition to the Motion for Summary Judgment. The substance of the affidavit was, first, that the defendant did not have time to obtain the facts because only (R. 42) "three months" have elapsed since the date the action was commenced; second, that plaintiff was guilty of negligence in employing Lamb, which was the proximate cause of its loss, although no facts were set up in support of this contention (R. 43); third, that the real party in interest was Seaboard Surety Company (R. 45); and fourth, that prior to the loss Seaboard Surety Company had issued

to plaintiff a "general depositors forgery bond," which not only indemnified the plaintiff but also its depository banks (R. 45), although it admitted the bond did not cover losses caused by the fraud of an employee. (R. 45).

G. *PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT*

After receiving the affidavit submitted in opposition to the plaintiff's Motion for Summary Judgment, it filed a supplemental affidavit signed by F. V. O'Brien (R. 46), superintendent of claims of Seaboard Surety Company, which alleged in substance that Seaboard had issued to McNeil two bonds, copies of which were attached to the affidavit. The first bond was a blanket position bond issued by Seaboard Surety Company to McNeil Construction Company. This bond did not underwrite depository banks but provided that Seaboard agreed to indemnify McNeil for any loss caused by the theft or other dishonest act of any employee "through any fraudulent or dishonest act or acts committed by any one or more of the employees *** during the term of this bond *** or within thirty days after leaving the service of the insured." (R. 48). Admittedly the dishonest acts occurred within this thirty-day period. This bond did not protect depository banks. The other bond was a depositors forgery bond, and, by its terms, did not cover acts of McNeil's employees, although it did run to depository banks. (R. 69).

IV.

THE THREE DECISIONS OF THE DISTRICT COURT

All of these motions were first presented to District Judge W. J. Jameson, who (1) granted the defendant's Motion for a Change of Venue and ordered the transfer of the action to the Helena Division; (2) denied defendant's Motions to Dismiss; and (3) declined to rule upon the plaintiff's Motion for Summary Judgment in view of the fact that the case was being transferred to another division before another judge (R. 72, 73). The decision of Judge Jameson is reported in 155 Fed. Supp. 658. We assign no error for any ruling of Judge Jameson in that decision.

The motion left pending by Judge Jameson's decision was then considered by Judge W. D. Murray, who, among other things (160 Fed. Supp. 809), granted defendant a conditional summary judgment (R. 84), though no such application had been made, with leave to the plaintiff to amend its complaint (R. 74-84) stating, first, that he would not recognize the loan receipt as such, but only as payment of McNeil in full, and, second,

> "If McNeil is bringing the action as a trustee of an express trust under the loan receipt, it is Seaboard Surety Company's action that it is bringing and as pointed out above under Meyers v. Bank of America, supra, and American Bonding Co. v. State Savings Bank, supra, cases, a necessary part of Seaboard's action, if any, is allegations and proof of equities in favor of Seaboard outweighing those in favor of the defendant bank, and the complaint is devoid of such allegations.

"Therefore, because from everything that is before the Court it appears that there may be equities in favor of Seaboard which entitle it to recover, and because McNeil has suggested the possibility that it should be permitted to make the recovery on behalf of Seaboard as a trustee of an express trust, and in the interest of justice, McNeil Construction Company is granted twenty days within which to file an amended complaint, otherwise summary judgment will be ordered for defendant."

We know of no case or Rule approving or authorizing conditional summary judgment in view of the fact that summary judgment is a decision on the merits. In granting judgment the Court necessarily took into consideration facts extrinsic to the complaint contained in affidavits (Seaboard's "loan"), but ignored the extrinsic facts in those same affidavits showing equities in favor of Seaboard against defendant. The Court likewise ignored Rule 8(a) (2) of the Federal Rules of Civil Procedure. In 1 Fed. Prac. & Proc., Barron & Holtzoff, Sec. 255, p. 431, it is stated:

"Under Rule 8(a) (2), only 'a short and plain statement of the claim showing that the pleader is entitled to relief' is required. If the claim for relief is stated with brevity, conciseness and clarity, this is all that is necessary. This provision indicates clearly the intention of the rules to avoid technicalities and to require only that the pleading give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. Pleadings are liberally construed under Rule 8(f) and a complaint is not subject to dismissal unless it appears to a certainty that no relief can be granted under any set of facts which can be proved in support of its allegations."

The nature of the decision under consideration and the act of the Court in granting defendant a conditional summary judgment without any application on the part of the defendant, put the plaintiff in a precarious position. If the plaintiff refused to amend and permitted judgment to be entered, that judgment would have been a judgment on the merits which would have precluded both McNeil and Seaboard from again filing suit if, on appeal, this Court should affirm. *Celanese Corp. v. John Clark Industries,* 214 Fed. (2d) 551, (C. A. 5th 1954).

The Court overlooked the fundamental rule heretofore uniformly applied by all courts considering summary judgment that

> "On a Motion for Summary Judgment, the formal issues presented by the pleadings *are not controlling and the Court must consider the affidavits and other matters presented by the parties to determine whether the motion should be granted.* *** On such a motion the Court considers the entire setting of the case and all papers of record. The pleadings as a whole, and not merely the complaint, are considered. In addition to the pleadings, the Court considers affidavits, admissions, stipulations, depositions, and answers to interrogatories." (Italics ours)
>
> 3 Fed. Prac. & Proc., Barron & Holtzoff, Sec. 1236, p. 89.

In the same volume of Federal Practice & Procedure Section 1240, p. 105, it is stated:

> "A motion to dismiss for lack of jurisdiction, improper venue, insufficiency of process, insufficiency of service, and failure to join an indispensable party contemplates a dismissal of the claim and not a judgment on the merits for either party. A motion to dismiss for failure to state a claim upon which relief can

> be granted, besides asking for a dismissal, is by its terms a contention that the pleading to which it is addressed does not in itself sufficiently state a claim for relief. A motion for judgment on the pleadings is based upon the ground that the moving party is entitled to a judgment on the face of the pleading themselves. On the other hand, a party moving for summary judgment contends that on the basis of the entire record—pleadings, depositions, admissions, and affidavits of both parties—there is no genuine issue as to any material facts and that he is entitled to a judgment as a matter of law."

In view of the foregoing, it can be seen that the District Court precluded the plaintiff from risking the entry of judgment and testing the validity of the Court's decision that a loan receipt agreement would not be recognized as such but was, in fact, payment, for the decision had the legal effect of not only granting the defendant summary judgment against McNeil Construction Company but also summary judgment against Seaboard Surety Company. Barron and Holtzoff, supra, and the Celanese *Corp. Case* supra. In view of this fact, the plaintiff had no alternative but to file an amended complaint.

The amended complaint specifically alleged negligence on the part of The Livingston State Bank in cashing these 29 payroll checks, and, compelled by the Court's order, alleges in substance that McNeil Construction Company was bringing this action on behalf of Seaboard Surety Company as trustee of an express trust. After the amended complaint was filed, the defendant again made a motion to (1) dismiss the action because the amended

complaint did not state a claim against the defendant upon which relief could be granted, and (2) alternatively, to require the joinder of Seaboard Surety Company as a party plaintiff. By summary order the Court did not consider the alternative of compelling joinder of Seaboard but granted defendant's motion to dismiss the complaint because (R. 89, 90),

> "The Court is of the opinion that the amended complaint does not state a claim upon which relief can be granted to McNeil Construction Company as trustee of an express trust for Seaboard Surety Company.
>
> "The Court is further of the opinion that the provision of the loan receipt agreement which McNeil Construction Company contends makes it a trustee of an express trust for Seaboard Surety Company, does not have that effect. Therefore, not only does the amended complaint fail to state a claim upon which relief can be granted to McNeil Construction Company upon the theory of an express trust, but it is also impossible for McNeil Construction Company to state a claim because the loan receipt agreement does not constitute McNeil an express trustee for Seaboard."

V.

SPECIFICATIONS OF ERROR

1. The Court erred in dismissing the original complaint.

2. The Court erred in dismissing the amended complaint.

3. The Court erred in denying plaintiff's Motion for Summary Judgment.

VI.

ARGUMENT

1. *The Court Erred in Refusing to Recognize Loan Receipt Agreements as Such.*

In Volume 3 of Moore's Federal Practice, p. 1349, par. 1709, it is stated:

> "An insurer which has merely made a 'loan' to an insured, to be repaid out of any recovery from a third party, is not a real party in interest in an action by the insured against a third party."

In 2 Federal Practice & Procedure, Barron & Holtzoff, Sec. 482, p. 13, it is stated:

> "If, instead of paying the loss, the insurer makes a loan to the insured under an agreement whereby the loan is to be repaid only out of any recovery which may be obtained against a third person, the insured and not the insurer is the real party in interest and entitled to sue the third person."

There are many cases that support the validity of and recognize loan receipt agreements of the same type used by Seaboard Surety Company and McNeil in the case at bar. As the cases hold, there are compelling equitable and commercial reasons sustaining the validity of loan receipts. First, the insured is promptly paid; second, insurance companies usually do not fare too well before juries when they are parties to a suit.

> *Merrimack Mfg. Co. v. Lowell Trucking Corp.*
> 46 N.Y. Supp. (2d) 736,
> 182 Misc. 947 (1944).

In *Celanese Corp. v. John Clark Industries,* 214 Fed. (2d) 551, (C.A. 5th 1954), action was brought by the

plaintiff against defendant to recover damages for a fire loss suffered by the plaintiff due to the negligence of the defendant. Among other things, the defendant claimed that certain named insurance companies with whom the plaintiff had executed loan receipt agreements were indispensable parties and should be named as plaintiffs in the suit. The Court rejected this contention, recognized loan receipts as a loan and not payment, and held (p. 556):

> "Since it is clear from the record that the suit was properly prosecuted by plaintiff under loan receipts, it is also clear that the insurance companies were neither indispensable nor necessary parties, and that, while the action of the court in permitting them to intervene in the suit was neither necessary nor proper, the defendant took no prejudice therefrom. The Clark Company was, under the undisputed facts of record, the real party at interest in the sense of the rule governing suits filed under loan receipt procedure, but if they were proper parties, the defendant has suffered no legal wrong from the way the cause was tried.
>
> "As appellant points out in its brief, the purpose of the practice long obtaining in the federal courts and now set forth in Rule 17 of the Federal Rules of Civil Procedure, 28 U.S.C.A., that every action shall be prosecuted in the name of the real party in interest, is to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.
>
> "In the light of the real meaning of the rule, if the insurance companies were proper parties, the defendant has suffered no legal wrong from the way the

cause was tried. It was not deprived of offsets or defenses it might have had against them. It was understood by all that the counsel for the insurance companies were in active conduct of the suit and the judgment entered would have barred them whether or not they were actually in the cause, so that defendant was at no time concerned with the question of lack of finality of the judgment or the possibility of its being again sued. Its real, its only concern was not to have the insurance companies brought into the suit to protect itself against being again sued or with respect to offsets or claims against them but for the possible prejudice which plaintiff might suffer in the minds of the jury because of the knowledge that plaintiff was insured. Such a purpose is neither a proper nor a legal purpose. The courts have uniformly condemned it."

Among other cases recognizing the validity of loan receipts are the following:

Luckenbach v. W. J. McCahan Sugar Refining Company,
248 U. S. 139,
39 S. Ct. 53,
63 L. Ed. 170.

Augusta Broadcasting Company v. United States,
170 Fed. (2d) 199 (CA 5th 1948).

Dixey v. Federal Compress & Warehouse Company,
132 Fed. (2d) 275, (CA 8th 1942).

Western Fire Insurance Company v. Word,
131 Fed. (2d) 541, (CA 5th 1942).

Hartford Fire Insurance Company v. Commercial Union Assurance Company,
131 Fed. Supp. 751 (DC N.Y. 1955).

Williams v. Union Pacific Railway Company,
94 Fed. Supp. 174 (DC Neb. 1950).

Capo v. C-O Two Fire Equipment Company,
93 Fed. Supp. 4 (DC N.J. 1950).

There is an annotation in 157 A.L.R. beginning at page 1261 which discusses loan receipts and which lists at page 1263 the many authorities supporting the validity of loan receipts. The annotator draws a conclusion evidently relied upon by the District Judge in the case at bar that whether a loan receipt is declared to be a loan or a payment depends upon the intent of the parties even though the instrument specifically recites that it is a loan. In this connection, we do not agree with the conclusions drawn by the annotator and we do not think the cases which he relies upon for his position are authority for that proposition at all as we shall hereafter point out in more detail. However, even assuming that the annotator is correct in his conclusions, it should be noted in the case at bar that the loan from the insurer to the insured was the exact amount of the loss, and that in the complaint at bar the insured is seeking to recover not only the amount of the loan but interest on the amount from November 1, 1956. In addition to this fact, the blanket position bond itself provided (R. 48)

> "In consideration of an agreed premium, Seaboard Surety Company, a corporation of the State of New York, *** hereby agrees to indemnify McNeil Construction Company of 5858 Wilshire Boulevard, Los Angeles, California, *** against any loss of money *** *which the insured shall conclusively prove has been caused by the* fraud or dishonesty of any employee or employees belonging to the insured, or in

which the insured has a pecuniary interest, ***." (Italics supplied).

The District Court admitted that no Montana decisions existed deciding the particular point involved here. The Court, however, speculated as to what the Montana Court would do and stated in substance that in the District Court's opinion Montana would refuse to recognize loan receipt agreements as such. The only Montana case that we have been able to find which sheds any light on the problem tends to favor the position that McNeil has taken in the case at bar. In *Rae v. Cameron,* 114 Pac. (2d) 1060, 112 Mont. 159, the Supreme Court of Montana held that all that was necessary to constitute a plaintiff the real party in interest was that he be vested with the legal title and hence that an assignee of an account for collection only could maintain action in his own name. The Court held:

> "Under this treatment of the cases, the law of this state is necessarily back in its rightful orbit, which is, as announced in *Genzberger v. Adams,* 62 Mont. 430, 205 Pac. 658, that all that is necessary to constitute a party plaintiff the real party in interest within the provisions of Section 9067 is that he be vested with the legal title. The Court there was dealing with an action by an assignee of a judgment who was suing for the benefit of another. We again adhere to that rule, and anything to the contrary appearing in State ex rel Freeborn v. Merchants Credit Service, Streetbeck v. Benson, and Northern Montana Association v. Hauge, all *supra,* is expressly overruled."

This decision would clearly indicate that Montana would permit this plaintiff to maintain this action.

Moreover, in *Dixey v. Federal Compress & Ware-*

house Company, 132 Fed. (2d) 275 (CA 8th 1942), the Court held in a case involving a settlement of a claim for a fire loss under a loan receipt that nevertheless title to the claim of the insured for the amount of the loss remains in the insured with a beneficial interest running to the insurer and therefore the insured holds the claim as the trustee of an express trust. See Rule 17 Federal Rules of Civil Procedure.

In *United States v. Aetna Casualty & Surety Company,* 338 U.S. 366, 94 L. Ed. 171, 70 S. Ct. 207, the Court considered whether "an insurance company" could bring suit in its own name against the United States on a claim to which it had become subrogated by payment to an insured, who in turn would have been able to bring such action. The problem of loan receipts was not considered by the Court, but there were some interesting observations which should be helpful to this Court in resolving the problem presented by this appeal. The Court said:

> "In cases of partial subrogation the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action. Under the common-law practice rights acquired by subrogation could be enforced in an action at law only in the name of the insured to the insurer's use, Hall & Long v. Nashville & C.R. Cos. (US) 13 Wall 367, 20 L. ed. 594 (1872); United States v. American Tobacco Co. 166 US 468, 41 L. ed. 1081, 17 S. Ct. 619, supra, as was also true of suits on assignments, Glenn v. Marbury, 45 US 499, 36 L. ed. 790, 12 S. Ct. 914 (1892). Mr. Justice Stone

characterized this rule as 'a vestige of the common law's reluctance to admit that a chose in action may be assigned, (which) is today but a formality which has been widely abolished by legislation.' Aetna Life Ins. Co. v. Moses, 287 US 530, 540, 77 L. ed. 477, 481, 53 S. Ct. 231, 88 A.L.R. 647 (1933). Under the Federal Rules, the 'use' practice is obviously unnecessary, as has long been true in equity, Garrison v. Memphis Ins. Co. (US) 19 How 312, 15 L. ed. 656 (1857), and Admiralty, Liverpool & Great Western Steam Co. v. Phenix Ins. Co. (The Mountain) 129 US 397, 462, 32 L. ed. 788, 799, 9 S. Ct. 469 (188). Rule 17 (a) was taken almost verbatim from Equity Rule 37. No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right and should appear in the litigation in their own names."

In any event, the District Court in its decision relied upon two California cases in refusing to recognize loan receipt agreements. The cases were *Meyers v. Bank of America,* 77 Pac. (2d) 1084, and *American Alliance Insurance Company v. Capital National Bank,* 171 Pac. (2d) 449. An analysis of these cases will reveal that the problem before this Court in the case at bar did not confront the California courts in deciding these cases. *The real holding in both of these cases was that a device such as a loan receipt or assignment of a cause of action cannot deprive the defendant of the equitable defenses it might have against the surety, even though such defenses would not ordinarily be available against the insured.*

We do not challenge these rulings. Here, we claim (1) the admitted facts show that the equities favor not only plaintiff but also its surety, and (2) in any event, there

was no basis either in law or in fact for dismissal. In the *Meyers* case, plaintiff's office manager received certain checks payable to the plaintiff. The office manager then forged the name of the payee by way of endorsement, negotiated them to one Wascher, who paid the full value therefor, and who in turn deposited them in his bank account with the defendant bank, which thereafter presented the checks to the respective drawees and received full payment therefor. The plaintiff was indemnified by the United States Guarantee Company and was paid in full. No loan receipt agreement was issued by the plaintiff; on the contrary, the plaintiff assigned to the bonding company any cause of action which it then had, together with the right to maintain an action at law in the name of the plaintiff. There are other equally valid grounds for distinguishing this case from the case at bar. First, unlike the case at bar there was no debtor-creditor relationship between the plaintiff and the defendant bank. Second, there were no equitable reasons for the bank to bear the loss rather than the insurer. In the case at bar not only was there a loan receipt agreement between the plaintiff and the insurer, but also the defendant bank was in a position to have avoided the loss by detecting the forgeries, as it certainly should have been able to do by a comparison of signatures. In addition, these 29 forged payroll checks, all payable to the same individual, all for the same payroll period, all in the same amount, were cashed by the bank in a period of ten days, which we submit is conclusive evidence of negligence on the part of the bank,

which would entitle either the plaintiff or the Seaboard Surety Company to recover in this action.

The *American Alliance Insurance Company* case, although involving a loan receipt, is distinguishable from the case at bar for the reason that the forgeries involved there were made by a trusted employee. He was a special agent of the plaintiff and was clothed with full authority from the plaintiff to present drafts to the bank and to receive the payment therefor. There was absolutely no proof of negligence on the part of the bank. As a matter of fact, it affirmatively appeared that it was plaintiff's own negligence in giving its agent authority which enabled him to promote the fraud that brought about the loss. Under these circumstances neither the plaintiff nor its insurance carrier could recover from the bank.

In *Merrimack Mfg. Co. v. Lowell Trucking Corporation,* 46 N. Y. Supp. (2d) 736, 182 Misc. (2d) 947, (1944), the Court considered the equitable and commercial reasons for recognizing loan receipts, stating:

> "The 'Loan Receipt' is a device by the use of which insurance may be paid to avoid some of the consequences of subrogation. Whatever reasons there may be of a business character for the insurance company shying away from subrogation, there is one of great significance which manifests itself when the contracting parties appear before a court and jury. Insurance companies by experience find that when their financial interest is discovered by a trial jury in a suit they fare not so well. In their reluctance to reveal their presence in litigation, insurance carriers do not stand alone. The courts have decided times without number that the unnecessary disclosure to the jury of the presence of a liability insurance company in a negli-

gence trial warrants a mistrial; when selecting the jury in negligence cases, the fact of liability insurance in the suit may not be brought to the jury's notice and only certain limited questions defined by the Legislature, Section 452, Civil Practice Act, calculated not to reveal the fact, may be asked.

"Many trials have their moments when the words 'Insurance Company' have either been mentioned, inferentially suggested or in some form disturbed the impartial composure of the court room where fair play is necessarily the wholesome atmosphere. Sensitive to the effect of that information falling upon the ears of the jurors, the court often ponders upon its own motion what action to take. Times are when counsel are rendered mute by the unexpected incident. The attorney affected detrimentally, satisfied to risk his chances on the evidence in the case, hesitates to speak lest his quest be denied and that which was only suggested is projected with all of its force to influence the jury, he fears, to allot something to the plaintiff, based on the convenient premise which disregards evidence 'it will not hurt the defendant and that insurance company will never feel it.'

"That the disclosure of the fact of insurance in a case is a disadvantage to one side is, if this court's observations have been accurate, universally understood by experienced trial lawyers. Divulgence of the fact by accident or design has been guarded against by trial judges over many years and the vice of letting the jury know about it has to a degree statutory recognition. Section 452, Civil Practice Act.

"Those who devised the 'Loan Receipt' which permits the insurance company to speedily pay its insured and yet press in court to recoup its losses from the wrongdoer without the company appearing by name, trying in that way to avoid unmerited disadvantages difficult to surmount, were not unrealistic. Defendant's attorney declares that the fears of his adversary about the attitude of juries toward insurance companies are unfounded. He states that his representa-

tion of insurance carriers has been of long duration and openly avowed. He implies that although the juries knew that his insurance company clients were involved, those clients have not been ill treated. Counsel's view that juries do not on occasion make distinctions not warranted by evidence, cannot be shared by this court despite this court's enthusiasm for the trial by jury as an effective agency of justice. Counsel's accomplishments under the circumstances ornament his brilliant record as a practitioner of which this court has personal knowledge.

"Should the court upon piercing the mantle of the 'Loan Receipt' and discerning its clear objective, enforce the letter of Section 210, Civil Practice Act, and thus condemn the practice of using Loan Receipts?

"Business men endeavor by the use of the 'Loan Receipt' to accelerate payment of insurance claims so that industry will not be stifled for the want of goods or the money equivalent while responsibility for torts related to the payment is being determined. The first (payment of claim can and should be disposed of with celerity because the loss ordinarily fixes liability and decides all questions. The second (determining responsibility for the tort) may be speeded only at the expense of justice. Withholding indemnity from the insured pending determination of litigation might force a settlement based not upon the merits of the claim but upon the need for funds. That practice penalizes the poor. It would seem that the 'Loan Receipt' fills a needed dual capacity."

For the foregoing reasons, we respectfully submit that plaintiff and Seaboard could properly use a loan receipt, and action could be brought in McNeil's name. The Court, therefore, erred in dismissing both the original and amended complaints.

2. *The Plaintiff's Motion for Summary Judgment Should Have Been Granted.*

The facts involved in this case are undisputed. No issues are raised by any reply affidavit; no claim is made in the answering papers that any fact set forth in the affidavits submitted in support of the Motion for Summary Judgment are false. *Section 5-1007, R.C.M., 1947,* provides as follows:

> "Liability of bank paying forged check. No bank shall be liable to a depositor for the payment by it of a forged or raised check unless, within thirty days after the receipt by the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid is forged or raised."

It is undisputed that this Section of the Revised Codes of Montana was complied with by the plaintiff. We submit that under the admitted facts disclosed here defendant is liable as a matter of law under the theory that the equities favor plaintiff and its surety company. As this Court said in *American Surety Co. v. Bank of California,* 133 Fed. (2d) 160, p. 162:

> "A surety may pursue the independent right of action of the original creditor against a third person, but it must appear that said third person participated in the wrongful act involved *or that he was negligent, for the right to recover from a third person is merely conditional in contrast to the right to recover from the pincipal which is absolute."* (Emphasis supplied).

Cf: *United States Fidelity & Guarantee Company v. First National Bank in Dallas,* 172 Fed. (2d) 258, (C.A. 5th 1949);

American Bonding Co. v. State Savings Bank, 47 Mont. 332, 133 Pac. 667.

We should have been granted summary judgment

even if the Court should conclude that the plaintiff may not recover unless there are facts from which it appears that in equity and good conscience the bank, rather than the surety, should stand the loss. Even under this doctrine neither the plaintiff nor its surety company should be required to stand this loss. Twenty-nine payroll checks were cashed by the defendant in a period of ten days; each of the checks was dated either Septembr 25 or 26, 1956; each check was payable to Lex Lamb; each check was for the same amount; each check was for the same payroll period. These facts are undisputed, and under these circumstances, we respectfully submit that not only did the District Court err in dismissing the complaint in the case at bar, but it should have granted plaintiff summary judgment.

On June 26, 1958, the Court of Appeals for the 8th Circuit in *Booth v. Barber Transportation Co.,* 27 Law Week 2003, held that summary judgment was proper in an equitable action when the facts were undisputed, saying:

> "Summary judgments have been awarded in actions where the relief sought was equitable in nature. Dale v. Preg, 9 Cir., 204 F. 2d 434; Huntington Palisades Property Owners Corp. v. Metropolitan Finance Corp., 9 Cir., 180 F. 2d 132; Curtis v. O'Leary, 8 Cir., 131 F. 2d 240.
>
> "In the Dale case, supra, specific performance of a contract to sell land was granted by summary judgment. The court states (p. 435): '* * * The Court correctly disposed of the question as one of law. * * * There being no genuine dispute of fact on any mate-

rial issue, the court below did not err in entering summary judgment. * * *'

"We find nothing in Rule 56 to support a conclusion that summary judgment is not available in actions which were formerly equitable actions. Rule 2 * * * provides, 'There shall be one form of action to be known as "civil action"' Paragraph 56.02(1), Moore's Federal Practice, states, 'Rule 56 makes the procedure available in all actions that are subject to the Rules, and, in accordance with the mandate of Rule 2, whether formerly legal or equitable.' We are satisfied that Rule 56 authorizes a summary judgment in a proper case in an action formerly cognizable solely in equity."

There are two conclusions set forth in the affidavit submitted by the defendant in opposition to the motion for summary judgment, which it claims should compel a denial of McNeil's motion for summary judgment. The first is that the plaintiff was negligent in employing Lex Lamb without inquiry because he was a notorious criminal and a fugitive from justice. The second reason is that Seaboard Surety Company indemnified the plaintiff. This second reason has been adequately discussed above and there is no need to consider it further here.

Turning our attention to the admitted fact that plaintiff did not make any investigation into Lamb's background before employing him, it should be remembered that Lamb was not employed in a confidential or executive position, but only in a relatively menial position. Secondly, there was no labor pool in Yellowstone National Park, and McNeil was compelled to rely upon transients to obtain laborers. These facts are undenied by the defendant.

The contention of defendant at bar was also made by the defendant in *Basch v. Bank of America,* 139 Pac. (2d) 1, 22 Cal. (2d) 316, where the defendant claimed that the plaintiff was negligent "in entrusting the management of his banking affairs to Lahr without having made any inquiry at the time of the latter's employment as to his reputation for honesty and integrity." The court rejected this contention. Moreover, the defendant also raised as a defense the negligent conduct of the plaintiff in failing to examine his bank statements for a period of ten months and thus discovering the forgeries. The court nevertheless held that the plaintiff was entitled to recover from the bank, stating (p. 9):

> "Under the authorities above cited, as well as others, the remiss conduct of the depositor in such cases as this is available as a defense to the bank *only* where it appears that the bank itself is free from negligence in the first instance in the payment of the forged checks. If in the exercise of due care the bank would have detected the forgeries without the aid of the depositor, the bank cannot then escape its contractual liability merely because the depositor was also at fault. In such circumstances, the bank does not pay because previous forgeries were not reported to it, *but it pays because on its own negligent inspection it supposed the checks were genuine.* Moreover, in line with the rigor of the rule that a bank pays out the money of its depositors on forged instruments at its peril, it was held in Sommer v. Bank of Italy, 109 Cal. App. 370, 376, 293 Pac. 98; that a bank seeking to escape liability for cashing unauthorized checks drawn against its depositor's account has the burden of proving as a preliminary point its own freedom from negligence in the matter." (Emphasis supplied)

In addition to the foregoing, assuming that McNeil

had a duty to defendant under the circumstances presented here to make inquiry concerning the honesty of any laborer that it might employ, nevertheless that negligent conduct, if it was such, was not a proximate cause of the loss under consideration. A proximate cause of the loss under elementary rules of causation was the negligent conduct of the bank in failing to inspect, properly, these twenty-nine payroll checks. Even the most casual inspection of them would have revealed that something was wrong. As a depositor, McNeil necessarily had placed with the bank the signatures of those agents of McNeil authorized to draw checks on its account. No claim is made in the opposing affidavit submitted by the defendant under oath that these were excellent copies of authorized signatures, but even assuming that they were excellent copies of authorized signatures, the bank certainly should have been put on notice when on October 2, 1956, the bank received three identical checks, each payable to Lex Lamb, each in the sum of $143.04, each dated September 25, 1956, except one which was dated September 26, 1956, and each of which recited on their face that they were for the pay period of "9-26-56", and each of which was stamped paid by the bank on "10-2-56". It would seem apparent in view of the foregoing assuming for the sake of argument that it was negligent, that it was intervening misconduct of the defendant that was the proximate cause of the loss. Causation in Montana as well as in almost every other jurisdiction in the United States is defined as follows:

"The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which the injury would not have occurred."

> *Mize v. Rocky Mountain Bell Telephone Company,*
> 38 Mont. 521,
> 100 Pac. 971.

In *Maynard v. City of Helena,* 160 Pac. (2d) 484, 117 Mont. 402, the court held that negligence cannot be predicated upon the failure to perform a statutory duty unless the failure to perform the duty imposed and required by statute is an efficient or proximate cause of which complaint is made.

We do not believe that there is any duty on the part of McNeil to investigate the background of a laborer it might employ in Yellowstone National Park, but even assuming that there was such a duty, it can hardly be argued that failure to perform his duty was an efficient or proximate cause of the payment of these twenty-nine payroll checks in a period of ten days by the Livingston State Bank.

Under these circumstances we respectfully submit that the plaintiff's motion for summary judgment should have been granted.

Respectfully Submitted

BROWN, SANDE, SYMMES & FORBES

By WEYMOUTH D. SYMMES